

Minimizing Payment of Ontario Probate Fees

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In many instances on death a person's assets cannot be transferred without the Executor of the estate applying for and obtaining an Estate Certificate (a "**Certificate**") from the appropriate Court. The Certificate (commonly known as Probate) gives banks, other institutions and the Land Registrar "comfort" that the person named in the Certificate has the authority to deal with the deceased's assets.

The *Estate Administration Tax Act* of Ontario provides for payment of a tax/fee upon the issuance of the Certificate; the tax is calculated at \$5.00 for each \$1,000.00 of value up to the first \$50,000.00 and \$15.00 per each \$1,000.00 of value thereafter. For example, an estate having a value of \$500,000.00 would pay tax of \$7,000.00 and the tax on a \$1 million estate would be \$14,500.00. While the amount of work performed by the Court to process the application for a Certificate may not differ based on the size of the estate the tax payable still increases based on the value of the estate. As a result lawyers, accountants and others have considered different ways to minimize or avoid this tax including the four approaches described in this article.

1. Joint Assets. If assets are owned jointly, on the death of one of the parties ownership automatically passes to the survivor by law; one could have several individuals or entities shown as the owner of an asset; however at some point Probate may be required when the last one of the survivors dies and the asset needs to be transferred.

2. Outright Transfer. Assets may be transferred while the owner is alive reducing the value of assets overall at death and as such reducing the amount of tax payable if Probate is required. However, when an owner sells or transfers an asset which is considered to be "capital property" this may trigger recapture and/or capital gains tax that in many instances could be higher than the Probate tax.

3. Multiple Wills. The Act requires payment of the tax based upon the value of the assets described in the application for Probate. Recent court decisions have held that the application for a Certificate only needs to state the value of the estate for which Probate is required. Therefore a practice has developed whereby a person may execute two or more Wills. One Will includes those assets which may be easily transferred without requiring the comfort that Probate provides, such as shares of private corporations. The other Will would then cover all of the other assets. Accordingly, if an estate consists of shares in private corporations worth \$2 million and other assets worth \$500,000.00 there could be a savings in excess of \$29,000.00 of Probate tax if multiple Wills were implemented.

4. Alter-Ego Trusts / Joint Partner Trusts. The *Income Tax Act* provides for special trusts called Alter-Ego and Joint Partners Trusts. The rules that govern these trusts provide that capital assets may be transferred on a tax-free rollover basis to such a trust provided the Settlor of the trust is over 65, is a resident of Canada and is the only person entitled to receive income or capital during his or her lifetime. The Settlor's spouse or joint partner trust may also be a beneficiary of such a trust. A spouse includes a common-law spouse.

Income earned by these trusts is taxed in the hands of the Settlor; however capital gains will be taxed in the trust.

When the Settlor dies there is no need to apply for Probate of his or her Will as the Settlor does not own any assets (they were transferred to a trust). The trust document contains provisions similar to those seen in most Wills.

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It is important to work closely with an accountant before proceeding with these special trusts to ensure they are properly implemented and do not result in unintended income tax liabilities.

In seeking to minimize Probate tax individuals should consider all of the options and their personal circumstances. Minimizing the payment of Probate and income taxes is one of many factors that need to be reviewed and considered in developing a personal estate plan and no one plan is right for everyone.